



**Katheka v National Police Service Commission & another (Petition 136 of 2018)
[2023] KEHC 268 (KLR) (Constitutional and Human Rights) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 136 OF 2018

HI ONG'UDI, J

JANUARY 26, 2023

BETWEEN

PETER KILONZO KATHEKA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

RULING

1. The Petitioner filed the Petition dated April 9, 2018 which was later amended pursuant to leave granted on March 15 2022. The amended Petition is dated March 30, 2022 and seeks the following prayers:-
 - a. A declaration that the petitioner's fundamental freedoms and rights have been infringed by the 1st respondent.
 - b. A declaration that the 1st respondents vetting process and decision was in violation of the petitioner's fundamental rights under article 27, 36, 40, 47 and 50 of the *Constitution* of Kenya.
 - c. An order of Judicial Review to quash the 1st respondent's decision of December 6, 16 and August 22, 17.
 - d. An order for reinstatement of the petitioner to his post as a Chief Inspector of Police as well as reinstatement of all his privileges including his salary.
 - e. An order substituting the respondent's decision with a declaration that there exist no materials to find that the petitioner had failed vetting.
 - f. Compensation to the petitioner for the violation of his fundamental rights and freedoms.



- g. Any other or further relief that the court may deem just and expedient.
 - h. Costs of this petition.
2. This Ruling is in respect of the 2nd respondent’s preliminary objection (P O) dated September 29, 2022. The P O is based on the following grounds:
- i. That Honourable Court lacks jurisdiction to hear and determine this petition because the dispute arises from employment relationships in terms of Article 162 of the Constitution and the Employment and Labour Relations Court Act and, therefore, falls for determination in the Employment and Labour Relations Court.
 - ii. That in the matter of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court of Kenya held that;

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
 - iii. That under Article 165(5) of the Constitution provides that;

The High Court shall not have jurisdiction in respect of matters-

 - Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;
 - Falling within the jurisdiction of the courts contemplated in article 162 (2).
 - iv. That under Section 12 of the Employment and Labour Relation Court Act provides that matters relating to employment fall under the jurisdiction of the Employment and Labour Relations Court.

Parties submissions*

- 3. Mr Marwa Litigation counsel, filed undated submissions on behalf of the 2nd respondent, who contends that this court lacks jurisdiction to hear the matter. Counsel referred to Articles 162(2) & 165(5) of the Constitution and section 12 of the Employment and Labour Relations Court (ELRC) and submits that the matter herein squarely falls under the jurisdiction of the ELRC. He argues that the matters concerning the recruitment, appointment /employment of state officers should be handled by the ELRC as the Court of first instance.
- 4. He referred the Court to the following cases;
 - i. Kenya Council of Employment Migration Agency v National Police Service Commission & 9 others [2014] eKLR
 - ii. Okoiti v A.G; Njenga (Petition No. E101 of 2020) [2022] (KLR)
 - iii. Okiya Omtata Okoiti v Cabinet Secretary, for information, Communication & Technology & 2 others; Mahmoud, Mohamed Noor & 6 others (interested parties)[2019] eKLR
 - iv. Abdikadir Suleiman v. County Government of Isiolo & another [2015] eKLR among others.



5. In the case of *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR the Court of Appeal held that:

“...The industrial Court [Employment and Labour Relations Court] which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only met and proper that the Industrial Court does exclusively entertain those matters in that context and with regard to Article 165(5) (b).”

The said decision by the Court of Appeal reiterated the findings by the High Court in the case of *United States International University (USIU) v The Attorney General* [2012] eKLR.

6. Further referring to *Harriet Kanorio Guantai v Cooperative Bank of Kenya & another* [2021] eKLR, counsel submitted as was held in the said case that the underlying issue here is an employment dispute. Further that the prayers the petitioner seeks can be granted by the ELRC. He therefore prayed for dismissal of the petition.

7. The 1st respondent who supported the P.O. filed written submissions dated November 14, 2022 through Brenda Opiyo Litigation counsel. She submitted that the Petitioner is contending his removal from the National Police Service through the vetting process which makes it a dispute arising out of employment between an employer and employee. This makes it fall squarely within the jurisdiction of the ELRC as stipulated in both Article 162(2) of the *Constitution* and Section 12 of the ELRC Act.

8. It is her submission that the High Court lacks the requisite jurisdiction to hear this petition. To buttress this argument she referred to the Law and the following cases:

- i. *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] KLR 1
- ii. *Cabinet Secretary, Ministry of Mining & another v National Environment Managing Authority & 3 others Ex – parte Cortex Mining Kenya Limited* JR Misc Appln No. 298 of 2013.
- iii. *London Distillers Kenya Limited & another v Kenya Union of Commercial Food Allied Workers Union* [2021] eKLR.

9. Relying on the case of *Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour & Travel* [2016] eKLR counsel submitted that the only thing the court can do is dismiss the amended petition with costs.

10. The petitioner in opposing the P O filed his submissions dated November 28 2022 through F G Thuita advocates. Counsel submitted that the P O was raised too late in the day when parties had already filed submissions. He urged the Court to dismiss the P O.

11. He submitted that a formula had been set out for matters where jurisdiction is contested. The formula in the use of the predominant issue test was applied in *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & another* [2018] eKLR where Munyao J stated:

“25. ...That in making a choice of which Court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.”



12. Counsel submitted that the petitioner is complaining of violation of his rights under Articles 27, 36, 47 & 50 of the Constitution and this Court is empowered under Article 165 of the Constitution to hear and determine the same. He further submitted that the predominant issue was vetting of the petitioner which is not an employment issue. It is provided for under the National Police Service Commission Act, and could have been done by anyone. The same ought to have been done in a transparent manner and with prior information being given to the parties involved. This brings into play the Fair Administrative Action Act.
13. According to counsel this is one of those matters where both the High Court and the ELRC have concurrent and coordinate jurisdiction in terms of the decision in Patrick Musimba v National Land Commission & 4 others [2015] eKLR. That this explains why the High Court has exercised jurisdiction in disputes related to vetting involving the 1st respondent. He cited the following cases in support:
- i. Eusebius Karuti Laibuta v National Police Service Commission (Pet No. 79 of 2014) [2014] eKLR
 - ii. Immanuel Masinde Okutoyi & others vs. National Police Service Commission & another [2014] eKLR.
 - iii. Wilfred Mbiti Jason vs. National Police Service Commission Petition No. 409 of 2015
 - iv. Belvin Wanjiru Namu v National Police Service Commission & another [2019] eKLR.
(among many others.)

It is counsel's submission that the respondents in particular the 1st respondent, participated in all the above cases, and it was insincere for them to turn around and claim that the High Court lacks jurisdiction to hear this petition.

14. On whether dismissal of a petition is a proper recourse in the present circumstances he answered in the negative. In support of this, he referred to several cases namely;
- i. Wycliffe Amukowa & 2 others v Machakos University [2022] eKLR
 - ii. Ali Jarso Wako & another vs. Ministry of Interior & Co-ordination of National Government & 5 others (High Court at Marsabit Petition No. 2 of 2020).
 - iii. Pamoja Women Development Programme & 3 others v Jackson Kibumbu Wangombe & another [2016] eKLR.
15. Counsel urged the Court not to take the drastic measure of striking out the petition as sought by the respondents. That it should consider transferring it to the ELRC considering the four (4) years the matter has been in Court. This is in the event that the Court rules that it lacks jurisdiction.

Analysis and determination

16. The main issue for determination in the P.O is whether this Court has the jurisdiction to entertain this petition. It is important to note that jurisdiction is a legalistic concept as it derives its force from the law. It is the law that donates jurisdiction to a Court. The Supreme Court has on a number of occasions addressed its mind in this respect. In the case of In the Matter of Interim Electoral Commission (2011) eKLR the Supreme Court opined as follows:

“29 Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and principles laid out in judicial precedent....



30 ...jurisdiction flows from the law, and the recipient – Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

17. The High court’s jurisdiction to entertain matters is found in Article 165(3)(d) of the Constitution which provides as follows:

3 Subject to clause (5), the High Court shall have-

- a. unlimited original jurisdiction in criminal and civil matters;
- b. Jurisdiction to determine the question whether a right or fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened;
- c. Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - i. the question whether any law is inconsistent with or in contravention of this Constitution.
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. A question relating to conflict of laws under Article 191; and
 - v. Any other jurisdiction, original or appellate, conferred on it by legislation.

18. The Constitution as well as Article 162 establishes two more Courts of equal status with the High Court which exercise jurisdiction over environment and land matters and employment and labour relations. This Article provides as follows:

2 Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a) Employment and labour relations;

19. As a result of Article 162 of the Constitution, the High Court is barred in Article 165(5)(b) of the Constitution from exercising jurisdiction conferred to the special courts. This article provides as follows;

The High Court shall not have jurisdiction in respect of matters-

- b falling within the jurisdiction of the courts contemplated in Article 162(2)



20. I have considered the submissions and cited authorities by all the parties. It is true that parties challenging the decisions of the vetting board have appeared before both the High Court and the ELRC. That in itself should not be the basis of allowing the matter to be heard by whichever court. This Court has the duty to examine the pleadings, and apply the law accordingly.

21. A perusal of the prayers sought by the petitioner brings out prayer No (d) as an outstanding one and key in this petition. It states as follows:

“An order for reinstatement of the petitioner to his post as a Chief Inspector of Police as well as reinstatement of all his privileges including his salary.”

22. Does the High Court have jurisdiction to reinstate employees, their salaries, allowances and privileges whatever the reason may be? This is a clear docket for the ELRC by virtue of Article 162 of the Constitution and Section 12 of the ELRC Act. The latter provides as follows:

“12. Jurisdiction of the Court

1 The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

a disputes relating to or arising out of employment between an employer and an employee;

2 An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

3 In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

i interim preservation orders including injunctions in cases of urgency; (ii) a prohibitory order;

iii an order for specific performance; (iv) a declaratory order;

v an award of compensation in any circumstances contemplated under this Act or any written law;

vi an award of damages in any circumstances contemplated under this Act or any written law;

vii an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or (viii) any other appropriate relief as the Court may deem fit to grant.



4 In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.”

23. Inasmuch as the petitioner has raised issues in respect of violation of his constitutional rights which are matters for this court to handle, does that alone cloth this Court with the jurisdiction to determine the clear issue raised under prayer (d) of the petition, as stated above?
24. On the flipside the ELRC does not only deal with issues related to Employer/Employee matters but also determines violations of Constitutional rights related to the Employer/Employee relationships of matters before it. In the case of *Okuya Omtatab Okoiti v Parliamentary Service Commission & another* [2021] eKLR the ELRC held:

“With regard to challenge on jurisdiction on the subject matter, the Court is vested with constitutional jurisdiction to protect the *Constitution* under Articles 258, 41, & 22 to enforce the Bill of Rights in disputes relating to employment and labour relations pursuant to provisions of Article 22(3) as read with Article 23 & 165(3)(b) of the *Constitution*, 2010.”

Also see the findings by the Court of Appeal on this in *Daniel N Mugendi v. Kenyatta & 3 others* [2013] eKLR.

25. As was rightly held by Munyao J in *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* (supra), the predominant issue test is key in this contest on jurisdiction. Everything in this petition is tied to the Employer/Employee relationship between the petitioner and the 2nd respondent, as it all begun there. The petitioner was vetted as an employee of the 2nd respondent. When it comes to issues of employment benefits, privileges and salary this Court lacks the jurisdiction to deal.
26. The next issue then would be what happens next? The respondents urged the Court to strike out the petition whereas the petitioner is amenable to the matter being transferred to the ELRC.
27. This matter was filed in 2018 which is not very few years ago. The parties kept on appearing before this Court but the issue of jurisdiction was not raised by either of the parties nor the court. It is only after the filing of the amended petition in March 2022 that the P.O herein was filed. The parties and Court operated under the impression that this Court had the jurisdiction to handle the matter and a lot of time has been spent. Would it then be just at this point to strike out the petition and may be expect the petitioner to file a fresh one before the right court? Will he still be within time to do so? I agree with Prof Joel Ngugi J (as he then was) when he held in *Pamoja Women Development Programme and 3 others* (supra) as follows:

“20. For me, that practical wisdom which we must bring to the strident doctrinaire logic that seemingly flows from Article 162(2) is one that permits the High Court in circumstances and context such as the one in this case to transfer it to the Environment and Land Court where primary jurisdiction lies. I believe that here is no constitutional subversion in the act of channeling the suit to the rightful Court. If anything, this furthers access to justice and eschews the use of technicalities as the golden pivot for adjudicating disputes. I find no categorical bar in *the Constitution* to this form of redemptive jurisprudence to prevent substantive injustice.

21. The High Court is still vested with inherent authority and inherent (incidental) jurisdiction to transfer certain suits which have been field in good faith in the High Court to Equal Status Courts even in the absence of a



specific statutory text bequeathing such powers to the High Court. This is in keeping with the Constitutional commandment to do substantive justice without undue obsession with technicalities.”

28. Justice must not only be done but must be seen to be done. In the circumstances of this case I find that justice demands that the petitioner be given an opportunity to articulate his case before the Court, with jurisdiction to deal.

The P O therefore succeeds to the extent that this court lacks jurisdiction to hear this case. I therefore allow the P O and transfer this petition to the ELRC Nairobi for hearing and determination. The file to be placed before the Principal Judge of the ELRC on February 3, 2023 for directions. Costs of the P.O to be borne by the petitioner.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JANUARY 2023 IN
OPEN COURT AT MILIMANI, NAIROBI.**

H I ONG’UDI

JUDGE OF THE HIGH COURT

